No. 95-1365

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ARCHEXPO COMMERCE & INDUSTRY CENTRE, BORIS KHLEBIN and ANDREI SCHERBAKOV,

Petitioners,

vs.

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

RULE 29.6 STATEMENT

International Ambassador Programs, Inc. ("Ambassador") was merged on August 4, 1995 into Ambassadors International, Inc. Ambassadors International Inc. is a public corporation, traded on NASDAQ under the symbol AMIE. Ambassadors International has no affiliates or subsidiaries other than Ambassador Programs Inc., the former International Ambassador Programs, Inc.

TABLE OF CONTENTS

	Page
Rule 29.6 Statement	i
Table of Contents	ii
Table of Citations	iii
Counter Statement of the Case	1
Reasons for Denying the Writ	7
The Petition Poses Primarily Factual Issues, and No Legal Issues of Consequence, and Should Therefore Be Denied.	7
A. The Petition for Writ of Certiorari Raises No Significant Legal Issues for This Court to Decide	7
1. The Court of Appeals' Decision Turned Primarily on Questions of Fact Which Were Resolved Against Archexpo	7
2. This Court's Resources Should Not Be Spent on Reexamination of Disputed Issues of Fact	10
B. The Only Issue of Law Posed by the Petition Is an Issue of Foreign Law, Which This Court Need Not Entertain, for Several Reasons.	10
Conclusion	12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 10

National Labor Relations Board v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) 10

Rudolph v. United States, 370 U.S. 269 (1962) 10

United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10

Rule Cited:

Federal Rule of Civil Procedure 44.1 8

I

COUNTER STATEMENT OF THE CASE

International Ambassador Programs Inc. ("Ambassador") was formed to organize informational programs and professional conferences in foreign countries. It was inspired by then-President Eisenhower's expressed hope that cultural exchanges between the West and Eastern Bloc countries might reduce Cold War frictions.

Archexpo Commerce & Industry Centre ("Archexpo") was a Soviet entity[1] which contracted to expedite visits by foreign delegations like those sent by Ambassador, by making travel reservations, getting accommodations, and assisting with visas and other arrangements.

Ambassador and Archexpo entered into contracts covering two distinct programs being operated by Ambassador. On April 28, 1989, they entered a contract at Moscow, USSR, in which "Citizen Ambassador" (a trade name for a division of Ambassador) promised to pay Archexpo to perform services for its delegations. This contract contained a clause requiring arbitration of disputes in the USSR. That agreement was modified on May 15, 1989, to call for Archexpo and "Citizen Ambassador" to finance one another's delegations (apparently in contemplation of Soviet delegations being received in this country by Ambassador), with offsetting expenses to be reconciled twice a year. This agreement also contained a clause calling for arbitration of disputes in the USSR. On August 22, 1989, "Citizen Ambassador" and Archexpo entered into a fresh contract, providing for advance payment by "Citizen Ambassador" prior to arrival of its delegations. Like the others, this contract too had a provision requiring arbitration in the Soviet Union.

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1. Archexpo's current status is unclear to Ambassador. Archexpo has claimed variously to be a "Russian limited partnership" and now a "commercial entity".

Meanwhile, in July 1989, Archexpo entered into a separate contract with Ambassador's "State Leadership Initiative" ("SLI") division, covering arrangements for visits by American delegations from state governments to the Soviet Union. This agreement, signed at Spokane, Washington, contained no arbitration provision.

Disputes developed in connection with both sets of agreements. The disputes over the Citizen Ambassador contracts were submitted to arbitration in the Soviet Union. Ambassador notified Archexpo and the arbitrators that it had claims, whose value exceeded the value of the claims asserted in arbitration, which were not arbitrable and which it intended to make the subject of a lawsuit in United States District Court at Spokane. Ambassador filed a lawsuit in District Court concerning the breach of the SLI contract (and the consequent injury to the SLI program), and served Petitioners Archexpo, Khlebin and Scherbakov. Petitioners did not appear, and did not answer.

The District Court action was resolved first. Ambassador moved for summary judgment against Archexpo, which was granted. Archexpo's only reaction to the motion for summary judgment was to send a letter (written by Petitioner Khlebin) to the district judge, which did not constitute a response or an appearance. The letter denied that the SLI contract was valid. It did not assert any right to arbitrate the SLI contract, or seek in any way to have the SLI contract submitted to arbitration. Nor did the letter suggest that the SLI contract had been addressed previously in arbitration — on the contrary, it affirmed that the contract "was never presented at the hearing in Moscow at the Arbitration court . . ."[2] The District Court entered judgment in favor of Ambassador against Archexpo on July 24, 1991.

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2. Petitioners contend that Ambassador "circumvented" or evaded arbitration, presumably to create the impression that some wrong was (Cont'd)

Later, the USSR tribunal made an award to Archexpo. Nearly two years after the District Court[3] entered judgment for Ambassador against Archexpo, Archexpo sought confirmation of the award in the United States District Court. Finding that none of the narrow grounds for repudiation of a foreign arbitration award under law existed, the District Court affirmed the award.

Significantly, there was no suggestion in connection with the proceedings to confirm the award that the award was in any sense inconsistent with the judgment Ambassador had previously been awarded in the District Court. Ambassador represented to the District Court that Ambassador's earlier judgment (based on the SLI contract) had "nothing to do with Citizen Ambassadors. It's a different program, different transaction altogether . . ." Archexpo did not dispute that representation; on the contrary, it expressly agreed through its counsel that the judgment awarded to Ambassador on the SLI contract was "*a separate issue*, but a related issue . . . As I said, *it's not relevant* to the issue of the motion [for confirmation of the arbitration award] here . . ."

The District Court entered judgment on the arbitration

(Cont'd)
practiced on Petitioners by Ambassador. That contention is incorrect. The SLI contract was not subject to arbitration; it contained no arbitration clause. Ambassador at all times fully disclosed to Petitioners and to the Soviet arbitration tribunal its intention to pursue its claim regarding the breach of the SLI contract in a court.

3. In the intervening two years, the Hon. Robert McNichols, who had entered the judgment in favor of Ambassador against Archexpo, passed away. The suit for confirmation of the arbitration award in favor of Archexpo, and the succeeding motion to vacate the original judgment in favor of Ambassador, were therefore referred to a different judge.

award on September 8, 1993. The District Court's decision was narrowly drawn, holding only that none of the limited grounds to refuse to confirm the award under the Convention governing recognition of foreign arbitration awards had been shown. Ambassador elected not to appeal this decision. The District Court had *not* yet held, as Petitioners imply in one place (*Petition p.* 11) and erroneously state in another, that the "arbitration award was based not on individual contracts but on the 'extended commercial relationship between the parties' " (*Petition p.* 14). On the contrary, counsel for the parties had agreed on the record that Archexpo's arbitration award on the Citizen Ambassador contracts was a "separate issue" from Ambassador's preexisting judgment on the SLI contract.

Once it had its arbitration award confirmed in the form of a judgment, Archexpo changed tack. It now argued that *both* judgments covered the *same* subject matter, that *all* agreements had been subject to arbitration, and that Ambassador had actually urged its SLI claim as a counterclaim in the Soviet arbitration. It urged the District Court to vacate the first judgment, that is, Ambassador's judgment against Archexpo. The District Court erroneously obliged.

The District Court reasoned that all contracts had been made in the course of dealings between Archexpo and Ambassador. Therefore, it thought, the arbitration clauses which had been included in the Citizen Ambassador contracts (which were negotiated and signed at Moscow, and which named "Citizen Ambassador" as the American party) should be deemed a part of the SLI contract (which was negotiated and signed at Spokane, Washington and which named "IAP Inc. State Leadership Initiative" as the American party). The SLI contract, of course, did not otherwise contain any arbitration clause.[4] The District

4. The absence of any arbitration clause was intentional. It is (Cont'd)

Court concluded that Archexpo's claim against Ambassador, and Ambassador's claim under the SLI contract against Archexpo therefore constituted a "single cause of action" which should have been decided in the same litigation, and that Archexpo's judgment confirming its arbitration award, being the "last in time" of two "inconsistent" judgments, should control.[5] The District Court therefore vacated the judgment in favor of Ambassador.

Ambassador appealed the order vacating its judgment. It pointed out that as a matter of undisputed fact the Citizen Ambassador and SLI contracts were separate contracts, and that as a matter of contract law there was no basis to import the arbitration clause from the former into the latter. Ambassador showed that the District Court had erred in its application of the *res judicata* rules by confusing the rules which forbid a plaintiff to split a "single cause of action" into several lawsuits with the very different rules governing the handling of the opposing claims of plaintiffs and defendants. Ambassador demonstrated that its SLI claim was not subject to any arbitration clause, and was not required to be (and had not been) posed as a counterclaim in the Soviet arbitration proceeding. Ambassador pointed out that the two judgments were neither "inconsistent" nor

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(Cont'd)
Ambassador's policy not to agree to any arbitration clauses calling for international arbitration in any place other than Sweden. Ambassador argued that the inclusion of the arbitration clause in the Citizen Ambassador contracts in derogation of its policy was *ultra vires*. The Soviet arbitrators rejected that argument, and the District Court affirmed their award. But the Court of Appeals was correct in refusing Archexpo's invitation to treat the SLI contract as though it contained a provision which the parties had deliberately omitted.

5. Petitioners characterize this reasoning as "prosaic", *Petition p.* 12, from which we understand that Petitioners now agree the District Court's reasoning was wrong.

antagonistic for *res judicata* purposes, as they covered different disputes. Ambassador asked the Court of Appeals to direct the District Court to honor *both* judgments, and to direct that the judgment in favor of Ambassador be reinstated.

The Court of Appeals agreed, and reversed. It held, on the undisputed facts of record, that the SLI contract was not subject to any arbitration clause, that the claim had not actually been litigated in the arbitration proceeding, and that both judgments were valid. The Court of Appeals ordered the District Court to reinstate Ambassador's judgment against Archexpo.[6]

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6. The District Court has received the mandate from the Court of Appeals, and has followed it. Following remand, Petitioners advised the District Court that judgment had only been entered against Archexpo originally, and urged that judgment not be entered against Petitioners Khlebin and Scherbakov. Ambassador, having verified that through some apparent oversight Messrs. Khlebin and Scherbakov were not named in the original judgment, took no position, but suggested default judgments could be entered against Messrs. Khlebin and Scherbakov, who had never appeared in the action, now over five years old. The District Court entered judgment for Ambassador against Archexpo only. Messrs. Khlebin and Scherbakov entered their appearance in an attempt to avoid default. The District Court has not yet heard or decided a motion for default judgment against them. Their assertion of standing as Petitioners here as persons subject to an adverse judgment is inconsistent with the representations they have made in the District Court.

REASONS FOR DENYING THE WRIT

THE PETITION POSES PRIMARILY FACTUAL ISSUES, AND NO LEGAL ISSUES OF CONSEQUENCE, AND SHOULD THEREFORE BE DENIED.

A. The Petition for Writ of Certiorari Raises No Significant Legal Issues for This Court to Decide

1. *The Court of Appeals' Decision Turned Primarily on Questions of Fact Which Were Resolved Against Archexpo.*

Archexpo was entitled to have Ambassador's judgment against it vacated only if it could show that Ambassador had a duty to arbitrate its claims arising out of the SLI contract in the USSR instead of bringing suit in District Court, or if it could show that Ambassador actually had litigated the SLI claims in arbitration and was therefore barred by the doctrine of *res judicata* from litigating it in District Court.

Whether Ambassador had a duty to arbitrate depended upon two questions: (1) whether the SLI contract was a discrete contract (which, having no arbitration provision, could be sued upon) or whether it was instead (along with the several Citizen Ambassador agreements) a part of a unitary contractual scheme all of which was subject to the arbitration provisions in the Citizen Ambassador contracts; and (2) whether or not some compulsory counterclaim rule in the Soviet arbitration proceeding required Ambassador to bring its claim in arbitration. Whether the two judgments were inconsistent for purposes of *res judicata* depended on the latter questions relating to the arbitrability of the SLI claim, and also upon whether Ambassador had in fact actually litigated its SLI claim before the Soviet arbitration tribunal. Of these questions, only the question

concerning the meaning of Soviet arbitration law is a question of law.[7]

Archexpo claimed that the SLI contract was not a discrete contract, but was part of a single contractual "course of dealing" also involving the Citizen Ambassador contracts, and therefore subject to the arbitration clauses in the Citizen Ambassador contracts.[8] It claimed that the Soviet arbitration rules contained a compulsory counterclaim rule. Finally, Archexpo claimed that Ambassador had actually litigated the SLI claim in arbitration.[9]

Archexpo lost below because the Court of Appeals rejected Archexpo's arguments as to all three propositions. The Court of Appeals agreed with Ambassador on the undisputed facts that the SLI contract (which contained no arbitration clause) was distinct from the Citizen Ambassador contracts (which did contain arbitration clauses), *Petition, Appendix pp.* A-18-20; that Archexpo had not demonstrated the existence of any compulsory counterclaim rule, *Petition, Appendix pp.* A-25-26; and that Ambassador had not actually litigated its SLI claim in arbitration. *Petition, Appendix pp.* A-24-25.

The Questions posed by the petition for a writ of certiorari and the arguments offered in support of the writ are fact-bound.

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7. F.R.C.P. 44.1 provides that issues of foreign law, which were formerly considered questions of fact, are to be decided as a matter of law.

8. Archexpo never explained why, if that really was its view of the contracts, it had not so informed the District Court in 1991. The contention is meritless, but even were it not meritless Archexpo waived it by its failure to timely raise it.

9. Archexpo has now apparently abandoned the assertion that the SLI claim was actually litigated in arbitration in Moscow. *Petition pp.* 7-8.

Petitioners argue that the Court of Appeals erroneously decided a congeries of factual issues, but point to only one alleged mistake on a question of law, relating to the proper construction of a procedural rule in Soviet Arbitration.

Question 1 in the Petition depends upon the assertions that (1) Respondent "circumvented" arbitration, and (2) that Petitioner Archexpo's arbitration award was "nullified". Question 2 supposes (1) that Soviet procedural law in connection with arbitrations imposed a compulsory counterclaim rule, and (2) that the Court of Appeals "ignored" Soviet procedural rules.

The Court of Appeals also heard and rejected the claim that Respondent improperly "circumvented" arbitration. Though the Court of Appeals did not discuss the claim in its opinion, the claim was a principal argument in Petitioners' brief in the Court of Appeals, and was answered in Respondent's reply in the Court of Appeals. The Court of Appeals' rejection of the claim is implicit in its decision that Ambassador never had any duty to arbitrate the SLI claim..

The Court of Appeals explicitly rejected the claim that Petitioner's award in arbitration would be "nullified" by the reinstatement of Ambassador's judgment against Archexpo. *Petition, Appendix p.* A-27. That claim is simply incorrect. The only judgment which was ever "nullified" at any point in these proceedings was that judgment won by Ambassador, which the District Court had vacated, but which has now been reinstated.

The Court of Appeals did not ignore the Russian authorities cited by Archexpo. It simply held that these authorities did not establish the existence of a compulsory counterclaim rule.

2. This Court's Resources Should Not Be Spent on Reexamination of Disputed Issues of Fact

This Court has said that it does not exercise its discretionary jurisdiction to decide disputed issues of fact. *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176-77 n. 8, (1981) *citing Rudolph v. United States*, 370 U.S. 269 (1962); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). The Court of Appeals based its decision on determinations of fact with which the Petitioners do not agree. Petitioners do not say that if the Court of Appeals was correct in its understanding of the facts, they nonetheless would have prevailed below but for some error of law. Petitioners do accuse the Court of Appeals of indulging some generalized "antipathy" to arbitration, but they do not demonstrate that they were entitled to prevail given the facts as the Court of Appeals understood them. Petitioners do not show, for example, assuming the Court of Appeals correctly held that the SLI contract was a separate agreement which contained no arbitration clause, that any principle requires a party to arbitrate a contractual dispute it has not agreed to arbitrate. This Court long ago declared that arbitration is required only when it has been agreed to. *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

B. The Only Issue of Law Posed by the Petition Is an Issue of Foreign Law, Which This Court Need Not Entertain, for Several Reasons.

The Petition presents only one issue that involves a question of law, the issue posed by Archexpo's claim that Soviet law of arbitration contains a provision for compulsory counterclaims. That is not an issue which merits attention by this Court, for four reasons.

First, there is no reason that this Court should devote its time to making pronouncements about the meaning of foreign law. It is not likely that legal practitioners or business people will look to this Court for controlling authority on foreign law, in preference to the authorities from the country where the law is in effect.

Second, the Court of Appeals was right: the provision of law Petitioners rely upon is not a compulsory counterclaim rule. Petitioners rely upon a provision which on its face does no more than declare a straightforward policy of *res judicata,* that a tribunal will not litigate a matter which has already been litigated in some other tribunal. *Petition pp.* 4, 20. Though Petitioners have obviously convinced themselves, through somewhat strained reasoning, *Petition pp.* 20-21, that the rule on which they rely requires counterclaims to be asserted in arbitration, the language of the rule actually says no such thing. The Court of Appeals was correct in its refusal to read the rule as a compulsory counterclaim rule.

Third, consideration of the rule cited by Petitioners is not even relevant if, as the Court of Appeals held, Ambassador's SLI claim was not required to be submitted in arbitration in the first place because the agreement from which the claim arose did not provide for arbitration. That a party is required to submit a specified matter to arbitration under one contract does not mean that it is required to submit its other, *non*-arbitrable claims arising from another contract in arbitration. This Court has never held that arbitration can be compelled in relation to any contract in which it has not been agreed to.

Fourth, it is not certain that, following the collapse of the Soviet Union, the rule is even still extant. Even if this Court were disposed to declare foreign law, it should not do so where it is not clear the law it is being asked to declare is of any interest to anyone but historians.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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